

Secretary's Order No.: **2008-F-0015**

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation No. 3511: Summer Flounder for 2008

Date of Issuance: April 15, 2008

Effective Date of the Amendment: May 11, 2008

I. Background:

A public hearing was held on Thursday, March 27, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation for Summer Flounder concerning size limits, creel limits, and seasons. The Summer Flounder Fishery Management Plan details the annual process that the Atlantic States Marine Fisheries Commission's Summer Flounder Fishery Management Board, the Mid-Atlantic Fishery Management Council and the National Marine Fisheries Service are to use for conservation equivalency in the recreational summer flounder fishery. These agencies agreed at their joint meeting on December 11, 2007 that the states would implement conservation equivalent measures rather than a coastwide management program for summer flounder in 2008. The total allowable harvest quota has been reduced for 2008 in order to comply with the rebuilding scheduled as mandated in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006. As such, all coastal states will

be required to reduce the number of summer flounder harvested by recreational anglers in 2008.

Delaware's harvest cap for summer flounder will be 64,338 fish in 2008, which represents a 41.3 percent reduction from the estimated 109,696 fish harvested in 2007. As such, a number of management options designed to reduce the recreational harvest of summer flounder for 2008 were presented by the Department at the public hearing on March 27, 2008. These proposed options included minimum size limits ranging from 18.5 to 19.5 inches, in conjunction with creel limits ranging from 1 to 4 fish per angler per day. Additional management options included a partial harvest season closure designed to restrain the harvest in 2008 at or below the state's harvest limit.

Recreational fishermen, bait and tackle dealers will be affected by the option ultimately chosen by the Secretary to manage the summer flounder harvest for 2008. The Department has the statutory basis and legal authority to act with regard to this promulgation pursuant to 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by this proposal.

After listening to the public comment received during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes "Option 5" best accomplishes the mandated 41.3% reduction with no closure period.

Numerous members of the public attended this hearing on March 27, 2008 to voice their concerns with regard to the Department's proposed changes to these regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. Afterwards, the Hearing Officer prepared her report regarding this matter and submitted the same to the Secretary for review and consideration. Proper notice of the hearing was provided as required by law.

II. Findings:

The Department has provided a reasoned analysis and a sound conclusion with regard to the response given to each such comment, as reflected in the Hearing Officer's Report of March 27, 2008, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;

4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of these proposed amendments would bring Delaware into compliance with federal guidelines for the management of summer flounder, since summer flounder come under both federal and state jurisdiction;
7. Option 5 will set the summer flounder restrictions at a 19.5" size limit and a 4-fish daily bag limit, with no seasonal closure. This was the option most supported by the public, based upon comments received by the Department during the public comment phase of this promulgation;
8. Option 5 will reduce the 2008 summer flounder harvest in Delaware by a minimum of 41.3%, as required by the ASMFC's Summer Flounder Fishery Management Board, the Mid-Atlantic Fishery Management Council and the National Marine Fisheries Service, and in order to comply with the rebuilding scheduled as mandated in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006;
9. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations

as proposed should be applicable to all Delaware citizens equally;

10. The Department's proposed amendments to Tidal Finfish Regulation for Summer Flounder for 2008 are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
11. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated April 14, 2008 and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Tidal Finfish Regulation for Summer Flounder for 2008 be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of State of Delaware Tidal Finfish Regulations for Summer Flounder for 2008 will bring Delaware into compliance with

federal guidelines for the management of summer flounder, since summer flounder come under both federal and state jurisdiction with regard to the harvest management of this species. This action, which incorporates Option 5 as Delaware's management plan for summer flounder, will reduce the harvest of summer flounder by a minimum of 41.3%. It is incumbent upon Delaware to be in compliance with the Commission's plan, not only to avoid federal sanctions against Delaware and its fishery, but to protect this species with these conservation measures to ensure that summer flounder will continue to be found in Delaware waters in the future.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy, purposes, and authority of 7 Del. C. §903(e)(2)(a).

/s/David S. Small
David S. Small, in his official
capacity as Acting Secretary

MEMORANDUM

TO: John A. Hughes, Secretary

FROM: Lisa A. Vest, Hearing Officer

RE: Proposed Amendments to Delaware Tidal Finfish
Regulation No. 3511: Summer Flounder for 2008

DATE: April 14, 2008

I. Background:

A public hearing was held on Thursday, March 27, 2008, at 7:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the existing Delaware Tidal Finfish Regulation for Summer Flounder concerning size limits, creel limits, and seasons. The Summer Flounder Fishery Management Plan details the annual process that the Atlantic States Marine Fisheries Commission's Summer Flounder Fishery Management Board, the Mid-Atlantic Fishery Management Council and the National Marine Fisheries Service are to use for conservation equivalency in the recreational summer flounder fishery. These agencies agreed at their joint meeting on December 11, 2007 that the states would implement conservation equivalent measures rather than a coastwide management program for summer flounder in 2008. The total allowable harvest quota has been reduced for 2008 in order to comply with the rebuilding scheduled as mandated in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006. As such, all coastal states will

be required to reduce the number of summer flounder harvested by recreational anglers in 2008.

Delaware's harvest cap for summer flounder will be 64,338 fish in 2008, which represents a 41.3 percent reduction from the estimated 109,696 fish harvested in 2007. As such, a number of management options designed to reduce the recreational harvest of summer flounder for 2008 were presented by the Department at the public hearing on March 27, 2008. These proposed options included minimum size limits ranging from 18.5 to 19.5 inches, in conjunction with creel limits ranging from 1 to 4 fish per angler, per day. Additional management options included a partial harvest season closure designed to restrain the harvest in 2008 at or below the state's harvest limit.

Recreational fishermen, bait and tackle dealers will be affected by the option ultimately chosen by the Secretary to manage the summer flounder harvest for 2008. The Department has the statutory basis and legal authority to act with regard to this promulgation pursuant to 7 Del.C. §903(e)(2)(a). No other Delaware regulations are affected by this proposal.

After listening to the public comment received during all phases of this promulgation process, and performing an exhaustive review and consideration of all components of the fishery, economic impacts and conservation of the resource, the Department believes "Option 5" best accomplishes the mandated 41.3% reduction with no closure period. A

detailed analysis of this recommended management option, along with discussion of the public comment received concerning the same, will be further discussed below.

Numerous members of the public attended this hearing on March 27, 2008 to voice their concerns with regard to the Department's proposed changes to these regulations, and the same were taken into consideration during the Division's review of this proposed regulatory amendment. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

A. Department Presentation/Public Comment:

At the time of the hearing on March 27, 2008, Richard Wong, Biometrician with the Department's Division of Fish and Wildlife, offered a brief explanation with regard to the salient points of the proposed amendments to these regulations. Mr. Wong began the Department's presentation by explaining that summer flounder is a federally managed species, and that management of the same is somewhat unique, as it is shared across several federal management entities, to wit: The Atlantic States Marine Fisheries Commission, the Mid-Atlantic Fisheries Management Council, and the National Marine Fisheries Service. Delaware and eight other states are integrally involved with the federal management process as well. As such, all of the states are required to comply with all federal actions and regulations which pertain to summer flounder.

Although its management is shared across several entities, the National Marine Fisheries Service (hereinafter referred to as "NMFS") actually makes the final decision as to what the total allowable landings are for summer flounder for each year. At the end of

each year, NMFS announces what the total allowable landings will be for the upcoming year. The total allowable landings number (hereinafter referred to as “TAL”) fluctuates each year, and it is tied to the status of the stock. Thus, as the stock improves, the TAL goes up; conversely, as the stock declines, the TAL goes down. The TAL is effectually the quota for the given year.

The TAL has fluctuated since quota management began in 1993. Interestingly, the annual landings amount (in pounds) more often than not exceeds the annual quota. Mr. Wong brought this point up in his presentation because very recently quota overages have become a very high-priority concern for the NMFS, and the Department believes that it is very likely that quota overages, beginning this year in the future, will carry consequences to the state(s) that incur them.

The Department’s presentation provided graphs depicting a declining quota for summer flounder over the past three years, ultimately reaching the point of the 2008 quota, which is the lowest that it has ever been since quota management began in 1993. These quotas each year are then partitioned into individual state quotas. Since 2001, states have chosen to develop their own fishing regulations in order to achieve their individual quotas each year.

Delaware has had a stable period of fishing regulations over the past few years, with general variations of 17.5”, 4-fish daily possessions, and no closed season. These yearly regulations have actually demonstrated an excellent track record, keeping Delaware’s harvest very close to the intended quota. The exception is last year, when at 18”, 4-fish daily possession, and no closed season, Delaware harvested approximately 110,000 summer flounder. This year’s quota is 64,000 fish. To put that into perspective,

Mr. Wong estimated that Delaware probably harvested 64,000 by mid-July last year. Therefore, since NMFS announced what the quota was at the end of last year, it has fallen on the Department to develop management options to reduce the summer flounder harvest from 110,000 fish to 64,000 fish for 2008.

Mr. Wong then described each of the five management option plans that were presented to the public at the hearing on March 27, 2008. Following that, the hearing was opened up for public comment. Many persons attending the hearing that night offered their comments and concerns to the Department regarding what each believed to be the best option for summer flounder management here in Delaware. Common concerns voiced during this portion of the hearing were, as always, the reliability of the fishing surveys, the economics of Delaware's fishing licensing, the effect of closures upon Delaware's local bait and tackle businesses, and, most importantly, the ability of the Department to enforce whatever option was ultimately chosen by the Secretary to manage the conservation of this species.

B. Department Review/Analysis Post-Hearing:

Following the hearing, the Department conducted an exhaustive review of all of the various options for reducing the 2008 summer flounder harvest. After reviewing the comments received from the public during this promulgation matter, it was clear that Option 5 received the greatest support from the public. According to Rick Cole, the Department's Program Manager responsible for this summer flounder regulatory proceeding, 87 emails from the public were received during the public comment phase of this hearing matter. Of those comments, 53 respondents favored Option 5, 15 supported Option 3, 13 supported Option 4, and 6 favored Option 1. The hard copies of those

emails were forwarded to this Hearing Officer for inclusion into the hearing record in this matter.

It should also be noted that, at the time of the public hearing on March 27, 2008, the Hearing Officer asked those in attendance if there was anyone who wanted to offer comments and/or opinion on anything other than Option 5, and no one indicated that they wished to do so. The Hearing Officer further asked if there were any objections to letting the hearing record reflect that the majority opinion of those in attendance at the public hearing were in favor of Option 5. In response, there were no objections, and, in fact, the audience broke out in applause, and the record was noted with regard to the same.

Option 5, which was the option most heavily supported by this public in this matter, accomplishes the required 41.3% reduction in the 2008 summer flounder harvest by implementing a 19.5" size limit, a 4-fish daily bag limit, and no seasonal closure. For the Secretary's review, Delaware's proposed amendments to these regulations are expressly incorporated into this report and attached hereto as Attachment "A" for that purpose. Also attached and expressly incorporated into this Hearing Officer's Report as Attachment "B" is the hard copy of the Department's PowerPoint presentation given at the public hearing of March 27 2008, which sets forth much of the scientific data regarding current summer flounder management here in Delaware, and the five management options proposed at the aforementioned hearing.

It should also be noted that the Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be

lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally.

III. Conclusions and Recommendations:

Based on the above discussion, I conclude that the Department has provided appropriate reasoning regarding the need for these proposed changes to Delaware's Tidal Finfish Regulation No. 3511 concerning summer flounder size limits, creel limits, and seasons, and has thoroughly addressed any public questions and/or comments provided during the various phases of the record developed in this matter. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

1. Proper notice of the hearing was provided as required by law.
2. The Department has jurisdiction under its statutory authority to make a determination in this proceeding;
3. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;

4. The Department held a public hearing in a manner required by the law and regulations;
5. The Department considered all timely and relevant public comments in making its determination;
6. Promulgation of these proposed amendments would bring Delaware into compliance with federal guidelines for the management of summer flounder, since summer flounder come under both federal and state jurisdiction;
7. Option 5 will set the summer flounder restrictions at a 19.5" size limit and a 4-fish daily bag limit, with no seasonal closure. This was the option most supported by the public, based upon comments received by the Department during the public comment phase of this promulgation;
8. Option 5 will reduce the 2008 summer flounder harvest in Delaware by a minimum of 41.3%, as required by the ASMFC's Summer Flounder Fishery Management Board, the Mid-Atlantic Fishery Management Council and the National Marine Fisheries Service, and in order to comply with the rebuilding scheduled as mandated in the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006;
9. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations

as proposed should be applicable to all Delaware citizens equally;

10. The Department's proposed regulation, as published in the March 1, 2008 *Delaware Register of Regulations* and set forth in Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and that
11. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

/s/ Lisa A. Vest.
LISA A. VEST
Hearing Officer